Spruce Up Corporation *and* David Brown, Hector Hunt, Jesse Womble

Cicero Fowler t/a Fowler's Barber Shops *and* Journeymen Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL–CIO, Local 844. Cases 11–CA–3949–1, –2, –3, and 11–CA–4198

February 22, 1974

SUPPLEMENTAL DECISION AND ORDER

On January 5, 1972, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding, *inter alia*, that Respondent Cicero Fowler engaged in certain conduct in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and ordering him to cease and desist therefrom and to take certain affirmative action, as set forth herein. Thereafter, the Board applied to the United States Court of Appeals for the Fourth Circuit for enforcement of its Order.

In the meantime, however, the United States Supreme Court issued its decision in *N.L.R.B.* v. *Burns International Security Services, Inc.*[2] On July 6, 1972,[3] at the Board's request, the court of appeals remanded the instant cases to the Board for reconsideration in the light of *Burns*.

We have reconsidered our original findings in these cases in light of the *Burns* decision, and the record as a whole, and have determined that the principles enunciated by the Supreme Court in *Burns* require that we make certain modifications of those findings as set forth below.

For many years the barbering at Fort Bragg, North Carolina, has been handled by concessionaires selected periodically by the Fort's exchange service on the basis of competitive bids. From March 3, 1969, through March 2, 1970, Respondent Spruce Up Corporation operated 19 of the 27 barber shops at Fort Bragg; the remaining 8 shops were operated by 2 other concessionaires, Roscoe and Fisher. The Charging Party, Journeymen Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL–CIO, Local 844 (hereinafter referred to as the Union), was certified in a unit of the 19 Spruce Up shops on August 4, 1969. In late 1969, the exchange service reopened the bidding for the operation of all of the barber shops at the Fort. In early 1970, Respondent Cicero Fowler was notified that he was the lowest bidder. On March 3, 1970, Fowler assumed operation of all the shops at Fort Bragg.

On February 6, 1970,[4] when the Union learned that Fowler was the lowest bidder and likely to take over the operation of the Spruce Up barber shops, it requested Fowler to recognize and bargain with it. Fowler refused, contending that he had no employees yet and in any event would have no duty to bargain before March 3. Fowler testified that at this meeting with the Union he told the union representatives, when asked what his intentions were about hiring barbers, that "all the barbers who are working will work." He also told the union representatives what he planned to pay the barbers. The Union renewed its request to bargain at another meeting with Fowler on February 26, but Fowler again refused, giving the same reasons.

On February 27, in anticipation of his takeover on March 3, Fowler distributed to the barbers of all 27 shops located at Fort Bragg individual form letters setting forth the rates of commission he intended to pay (which were different from those paid to the barbers by Spruce Up Corporation) and requesting that all those who desired to work for Fowler on that basis return the letter with their signature. On March 2, at a meeting called by the Union and attended by most of the barbers from all 27 shops, the men voted not to sign the form letter and to withhold their services and picket the base. The next day, a majority of the barbers failed to report to Fowler and picket lines were set up at the entrance to the post.

Eighteen of the former Spruce Up barbers crossed the picket line and reported to work for Fowler on March 3, on the basis of the new rates previously announced by him. The next day Fowler began hiring replacements for those failing to report and after 2 weeks the replacements outnumbered the former Spruce Up barbers. However, as time went by and the strike continued, more and more of the former Spruce Up barbers crossed the picket lines and reported to work until, by April 14, a majority of the barbers working for Fowler in the 19 former Spruce Up shops (32 out of 55) were barbers who had previously worked for Spruce Up, and such barbers remained in the majority thereafter. After March 3, on two separate occasions, April 3 and April 11, the Union met with Fowler and requested recognition, but Fowler refused and has continued to refuse to recognize and bargain with the Union.

By May 28, about half of the strikers had returned to work and on that date Fowler received a letter from those remaining on strike unconditionally offering to return to work. None of this latter group has been rehired nor does the record show that any other barber has been hired as of the date of the hearing.

[1] 194 NLRB 841
[2] 406 U.S. 272 (1972).
[3] No. 72–1268 (unpublished)
[4] Hereinafter, all dates refer to 1970 unless otherwise stated

In our original decision,[5] we adopted the Administrative Law Judge's findings that Respondent Cicero Fowler violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union representing the former Spruce Up employees since February 26, 1970, by dealing directly with such employees on February 27, and by unilaterally changing commission rates of such employees on March 3, 1970. We ordered Fowler, *inter alia,* to reinstate and make whole, as of May 28, 1970, those former Spruce Up employees unconditionally offering to return to work on that date, having found them to be unfair labor practice strikers. We hereby modify those findings for the reasons set forth below.

In *Burns,* the Supreme Court enunciated the principle that, "a successor employer is ordinarily free to set initial terms on which it will hire employees of a predecessor" without first bargaining with the employees' bargaining representative. In the same paragraph, however, it recognized an exception to that principle in "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit . . . ."[6] Without delineating at this time the precise parameters of that exception, we are constrained to find the instant facts do not fall within it.

Although, at the February meeting, Fowler expressed a general willingness to hire the barbers employed by the former employer, he at the same time indicated that he was going to be paying different commission rates. Fowler thereby made it clear from the outset that he intended to set his own initial terms, and that whether or not he would in fact retain the incumbent barbers would depend upon their willingness to accept those terms. When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one, as illustrated by the present facts. Many of the former employees here did not desire to be employed by the new employer under the terms set by him—a fact which will often be operative, and which any new employer must realistically anticipate. Since that is so, it is surely not "perfectly clear" to either the employer or to us that he can "plan to retain all of the employees in the unit" under such a set of facts.

We concede that the precise meaning and application of the Court's caveat is not easy to discern. But any interpretation contrary to that which we are adopting here would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns.* For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns.* And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish—nor do we believe the Court wished—to discourage continuity in employment relationships for such legalistic and artificial considerations. We believe the caveat in *Burns,* therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,[7] or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

For these reasons, we find that Fowler's expressions to the old employees were not within the Court's caveat, and we conclude that those expressions did not operate to forfeit his right to set initial terms. Accordingly, we find no violation of the Act in his having done so.[8]

However, as in *Burns,* we find that Respondent did, subsequently, employ a majority of the former

[5] 194 NLRB 841

[6] The precise language of the Court was

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act, 29 U.S.C. Section 159(a) [406 U.S. 272 at 294-295.]

[7] See, for example, *Howard Johnson Company,* 198 NLRB No. 98, and *Good Foods Manufacturing & Processing Corporation, Chicago Lamb Packers, Inc. Division,* 200 NLRB No. 86, where the successor-employers, without prior warning, unilaterally changed the terms and conditions of employment prevailing under the predecessor after already having committed themselves to hire almost all of the old unit employees with no notice that they would be expected to work under new and different terms. In those cases we found a violation of the respondents' bargaining obligation.

[8] As noted in the concurring part of his separate opinion, Member Kennedy joins Chairman Miller and Member Jenkins in the foregoing interpretation of the pertinent *Burns* language and the application of that interpretation to the facts here.

Spruce Up barbers in his work complement in the certified unit, at least by April 14. By that date Fowler had in fact hired 32 out of 55 such former employees in the certified unit. Thus, from that date, the Union had, at the least, a presumption of continuing majority status which Respondent failed to overcome. Respondent was therefore obligated to recognize and bargain with it.

Member Kennedy, in dissent, expresses the view that there was a substantial change in the unit arising out of the fact that Spruce Up had operated 19 barber shops at Fort Bragg whereas Fowler contracted to operate all 27 shops located at the Fort. Member Fanning, in his separate opinion, has stated the view, subscribed to by Member Penello in his dissent, that the addition of these eight shops did not destroy the appropriateness of the certified bargaining unit and constituted only "an expansion of the bargaining unit." We agree, essentially, with the view of Members Fanning and Penello. This addition of a few more shops does not destroy the basic continuity of the employing industry, which is the keystone of our successorship doctrine. We here speak of what the Supreme Court in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 551 (1964), refers to as "a substantial continuity of identity in the business enterprise." There can be no doubt that, had the predecessor acquired the contract to operate these eight additional shops, we would have treated the addition of these like facilities and similarly classified employees as an accretion to the certified unit. It seems reasonable to apply the same doctrine to the successor.

Had there been a substantial alteration in the basic character of the unit, as in *Atlantic Technical Services Corporation*[9] (from a 14,000-plus multilocation unit to only a single mailroom employing 41 employees), the situation would be quite different and, as we held there, there would then be no successorship at all in any event. That is an entirely different situation from the one presented here, where the only addition to the unit would, had it been added by the predecessor, clearly have been an accretion.

Member Kennedy is of the further view that the majority must be measured in the "new" unit consisting of the 19 Spruce Up shops plus the 8 additional shops on the base which Fowler contracted to operate. Members Fanning and Penello, on the other hand, are of the view that only "a legally significant portion of the successor's employment force" must consist of employees previously employed by the predecessor.

We believe the position of Members Fanning and Penello to be at odds with the clear import of the Supreme Court's decision in *Burns* which has recently been reiterated by a unanimous Court in *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168 (1973), where the Court said in footnote 6:

> . . . the purchaser, if it does not hire any or a majority of those employees, will not be bound . . . by any order tied to the continuance of the bargaining agent in the unit involved.

But we also believe Member Kennedy to be in error with respect to the unit in which the majority must, under *Burns*, be tested. As we have pointed out *supra*, had the predecessor acquired the additional eight shops, there can be no doubt that this Board would have treated such an addition of like facilities and similarly classified employees as an accretion to the extant unit, and such an accretion would have given the predecessor no right to question the continuing majority status of the Union. Neither, then, do we understand why the successor to the bargaining obligation should be permitted to do so, if it becomes clear on the record evidence that his hires from the predecessor's work force meet the test announced by the Supreme Court—i.e., that the majority status of the Union in the preexisting unit has been reestablished. At the least, we would find that at such time as the hiring engaged in by the successor results in a reestablishment of a majority in the preexisting unit there arises a presumption of continuing majority status. If, after that point has been reached, new facts and circumstances arise which under our usual tests would provide the Employer with objective evidence casting doubt on the continuance of the majority status, he might be justified in putting the Union to the test of demonstrating its majority through a Board election or otherwise.

But, as pointed out by Member Fanning in his dissent at footnote 34, Fowler does not appear to have asserted any such defense herein. To the extent that we have any evidence with respect to the effect on majority status of the added 8 shops it tends to reaffirm, rather than to negate, the presumption which we are here applying. Thus, barbers employed in the former Roscoe and Fisher shops attended and participated in the union meeting of March 2, and some barbers joined the Spruce Up barbers in picketing the Fort and were included in the Union's "return to work" offer of May 28. Under all of these circumstances we see no reason not to rely on the presumption of continuing majority status, and we find that, on and after April 14, the Union represented a majority of Fowler's work force and he was thereupon obligated to recognize and bargain with it.

[9] 202 NLRB 169, cited in Member Kennedy's dissent.

Although the record does not reflect that the Union expressly requested Fowler to bargain after April 14, the Board has long held that a union is not obligated to repeatedly renew its request to bargain when it would be futile to do so, particularly when the circumstances of previous requests are such as to put the employer on notice that the union is desirous of representing the employees and where no intervening disclaimer of that interest has been made or can reasonably be inferred from the union's conduct. As noted above, here the Union has requested recognition only 3 days earlier, on April 11, and gave every indication, by its continued picketing, that it was still claiming to represent the employees in the certified unit on and after April 14. Accordingly, we find that the Union's request to bargain on April 11 was of the nature of a continuing request, and should reasonably have been understood by Fowler to be such.

We turn now to yet another knotty problem—i.e., the status of the persons formerly employed by Spruce Up who withheld their services from Fowler, and who made an unconditional offer to accept employment with Fowler on May 28. They are referred to by the Administrative Law Judge as "claimants." The Administrative Law Judge rejected General Counsel's contention that all former Spruce Up employees were discriminatorily denied employment, and we agree. He also held that the 24 "claimants" could not be treated as unfair labor practice strikers because they had never become employees of Fowler. In support of this finding, he cited *Joliet Contractors Association*, 99 NLRB 1391, affd. 202 F.2d 606 (C.A. 7), in which we held that a concerted withholding of services from a prospective employer was not a strike. We agree that his holding in this regard is consistent with our precedent.

He then went on to find, however, that Respondent's unlawful direct dealings with employees, unilateral conduct, and refusals to bargain caused the loss of employment of the "claimants," and, as a remedy for these violations, he ordered reinstatement and backpay and directed that any persons hired after March 3 be displaced, if necessary, in order to permit the full effectuation of his order. As authority for applying this remedy, he cited *Chemrock Corporation*, 151 NLRB 1074. The rationale there, and the Administrative Law Judge's rationale here, is to the effect that the loss of employment was caused by respondent's failure to fulfill its bargaining obligation.

The Administrative Law Judge found a violation of Respondent's bargaining obligation to have commenced on March 3, and that Respondent on that date violated the Act by unilaterally changing wages and improperly dealing with individuals. We have rejected those findings as being precluded by our understanding of the principles of *Burns*, but we have found a violation of Respondent's bargaining obligations to have commenced on April 14—also based on our understanding of the principles of *Burns*.

But we must now determine whether Respondent's unlawful refusal to bargain on and after April 14 may fairly be said to have caused a loss of employment by the "claimants." If so a reinstatement and backpay order is appropriate to restore the status quo but if not, such a remedy would not be warranted.

This is a much more difficult question to answer in the present posture of this case than it was in the pre-*Burns* posture in which the Administrative Law Judge below decided it. For we have now held that the Respondent properly offered employment to the former Spruce Up employees at terms unilaterally set by him. And it is quite clear from the record that any of the claimants could have had employment at all times relevant hereto, had they seen fit to go to work on those terms. But to what extent were the claimants deterred from seeking such employment by the lawful new terms, and to what extent were they deterred by Respondent's refusal to recognize the Union--a refusal which, under *Burns*, was lawful prior to April 14 but unlawful thereafter?

We believe we are entitled to resolve the doubts against the wrongdoer, with due respect to the requirements of supporting record evidence. We cannot say with absolute certainty how many of the claimants would have accepted employment with Fowler on April 14 had he consented to recognize the Union and commence bargaining on that date. It seems reasonable to us that they might have. Even though they would have had to accept new terms which they obviously found undesirable, they would at least then have had an opportunity to seek to better those terms through the collective bargaining to which they were lawfully entitled. It is clear that they cherished that right to representation, and that Respondent's refusal to grant it was a significant motivating factor in their unwillingness to accept employment.

But we are unwilling to rely solely on inferences on the basis of our expertise so to find. Instead, we turn to the record evidence, which shows that all doubts as to this were removed by the events of May 28, 1970, when, through their Union, the claimants offered unconditionally to accept employment. This constitutes clear and unrefuted evidence that as of that date the claimants were not motivated by the unacceptability of Respondent's terms, and it is clear that from that date forward the claimants were entitled to any available jobs on a preferential basis, and any continuing loss of employment thereafter

was, demonstrably, a result of Respondent's unlawful continuing refusal to recognize their bargaining agent.

Accordingly we find that from and after May 28 any and all former employees of Spruce Up suffered a loss in employment as a direct result of Respondent's continuing unlawful refusal to bargain with their chosen representative. And we shall therefore order reinstatement and backpay commencing on that date. Fowler will be ordered to offer such former Spruce Up employees immediate placement in the positions they formerly held with Spruce Up, or, if such positions no longer exist, in substantially equivalent positions, dismissing, if necessary, any persons hired on or after May 28 to fill such positions.

Since it appears likely that there will not be sufficient jobs for all of the foregoing claimants and the remaining employees, we shall require that all available jobs be distributed in accordance with such nondiscriminatory practice as has been followed in the past in effecting layoffs, and that any employees for whom jobs are still unavailable shall be placed on a preferential hiring list, their position on such list to be determined in accordance with such prior practice.

THE REMEDY

Having found that Fowler violated Section 8(a)(5) and (1) of the Act in refusing to recognize and bargain with the Union after April 14, we shall order Fowler to recognize and bargain with the Union upon request.

Having found the former Spruce Up employees who were not employed by Respondent after May 28 suffered a loss of employment because of Respondent's unlawful refusal to bargain, we shall order Fowler to offer these employees reinstatement to their former positions, or, if those positions are no longer available, to substantially equivalent positions, dismissing, if necessary, any persons hired after May 28. If there are still not sufficient positions to reinstate all the employees, we shall order Fowler to place those remaining on a preferential hiring list. We shall also order Fowler to make whole those employees entitled to reinstatement for any earnings they may have lost during the period commencing May 28, 1970, to the date that he offers them reinstatement.[10]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondents, Spruce Up Corporation and Cicero Fowler t/a Fowler's Barber Shops, Fort Bragg, North Carolina, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraph B 1(b), (c), and (d).

2. Substitute the following for paragraph B 2(b) and (c):

"(b) In the manner outlined in the Remedy section of the Board's Supplemental Decision, offer all those named in the attached notice marked "Appendix B" reinstatement, without prejudice to their seniority or other rights and privileges.

"(c) In the manner detailed in the Remedy section of the Board's Supplemental Decision, make whole the foregoing employees for any loss of earnings suffered from Fowler's failure to offer them reinstatement on and after May 28, 1970."

3. Delete paragraph B 2(f) and reletter the succeeding paragraphs accordingly.

4. Substitute the attached notice for the Administrative Law Judge's Appendix B.

MEMBER KENNEDY, concurring in part and dissenting in part:

I agree with Chairman Miller and Member Jenkins (hereinafter referred to as the majority) that the Supreme Court's decision in *Burns* requires us to vacate our earlier decision in which we found that Respondent Fowler violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on February 26, 1970, by dealing directly with the former Spruce Up employees on February 27, 1970, and by unilaterally changing commission rates of such employees on March 3, 1970.[11] I do not agree with the majority that Fowler violated Section 8(a)(1) and (5) of the Act when he failed to bargain with the Union on and after April 14, 1970. In my view, there is no evidence in this record to support a

[10] As noted in their separate opinions, Members Fanning and Penello would find that the refusal to bargain occurred at earlier times than is found by Chairman Miller and Member Jenkins, a circumstance which would enlarge the reinstatement and backpay rights of the striking unit employees beyond that afforded by this order. Their view, however, does not command a majority. Accordingly, they join in the order providing the remedial relief set forth above.

[11] I disagree with the conclusion of Members Fanning and Penello that Fowler forfeited his right under *Burns* "to set initial terms on which it will hire the employees of a predecessor" because he expressed a general willingness to hire all barbers then working for Spruce Up who were willing to accept his commission rates which were different from those of Spruce Up. Surely, the Supreme Court did not mean that a general expression of willingness to hire the old employees on his terms defeated the very right of the new employer to set terms and conditions of employment. Fowler made clear to the union representatives on February 6 and to the Spruce Up barbers employed on February 27, 1970, that he would continue with the old work force *only* if they accepted the new commission rates which he proposed to them. The *Howard Johnson* case involved unilateral changes *after* the employees were hired.

finding that Fowler committed any unfair labor practices. Accordingly, the makewhole and reinstatement order of the majority is without legal support.

The majority properly relies on *Burns* to find that Fowler lawfully set the terms and conditions of employment of his employees without bargaining with the Union. In finding an unlawful refusal to bargain on April 14, however, they ignore the crucial observation of the Supreme Court in *Burns* that the bargaining obligation passed to the new employer in that case because the bargaining unit remained unchanged. The record herein establishes that there was indeed a substantial change in the bargaining unit. Furthermore, there is no proof that the Union was supported by a majority of employees in an appropriate unit of Fowler's employees, and the Union never requested Fowler to bargain on April 14, or thereafter, the date on which the majority finds that Fowler refused to bargain.

There Was a Substantial Change in the Unit for Bargaining

It is clear that approximately one-half of the Spruce Up barbers have never been employed by Fowler. As found by the Administrative Law Judge, most of the barbers formerly employed by Spruce Up met on March 2, 1970, and voted not to accept Fowler's terms of employment. They voted "to withhold their services and picket the base." The picketing continued until May 27 when "about half of these barbers had returned to work, and on that date the rest offered to return but none of the latter group has been hired." If the Board majority is correct in construing *Burns* to teach that Fowler lawfully set terms and conditions of employment when he commenced operations, it necessarily follows that Fowler was not obliged to discharge his non-Spruce Up barbers on May 28 to make room for those Spruce Up barbers who then indicated their willingness to accept Fowler's terms. Since it is clear that "about half" of the Spruce Up barbers have not been hired by Fowler, it cannot be said that there has been sufficient continuity of employment to make Fowler a successor to Spruce Up. It is inaccurate to suggest that Fowler has continued with basically the same work force.

The majority opinion correctly points out that prior to March 3, 1970, Spruce Up operated 19 of the 27 barber shops at Fort Bragg. The eight other barber shops at the Fort had been operated by two other concessionaires; namely, Roscoe and Fisher. The Union had not been recognized or certified at any of these eight shops. On March 3, 1970, Fowler commenced operations of all 27 shops at Fort Bragg.

We have recently had occasion to examine the principles governing cases where the transfer of a business from one employer to another has resulted in a substantial change in the scope of the unit. In *Atlantic Technical Services Corporation*,[12] Trans World Airlines had performed mail and distribution support services at the Kennedy Space Center under a contract with NASA. After obtaining the contract, TWA voluntarily agreed to extend its basic companywide collective-bargaining agreement, which covered some 14,000 employees, to the 41 employees performing mail and distribution functions. Thereafter, the Respondent Atlantic Technical Services Corporation obtained the contract to perform the mail and distribution functions formerly performed by TWA and hired 27 of the 41 employees then performing these duties. The Respondent ATSC thereafter refused to bargain with the Union asserting, *inter alia*, that the unit requested was inappropriate and that it doubted the Union's majority status. We found that the Respondent ATSC was not a successor-employer to TWA relying, in part, on the fact that "the diminution in the scope of the unit . . . is a relevant factor to be considered, among others, in determining whether or not a new employer is a successor." Accordingly, we found that Respondent ATSC was not bound by TWA's obligation to bargain with the union on the successorship theory.

In the case before us we have, not a diminution of the former bargaining unit, but a substantial expansion of the unit from the 19 shops operated by Spruce Up to the 27 shops operated by Respondent Fowler.[13] The applicable principles remain the same. The crucial question is whether the transfer of the business from one employer to another has brought a substantial change in the unit.

In my view, all of my colleagues fail to give sufficient weight to the fact that Fowler took over operation of all the shops at Fort Bragg and not just those previously operated by Spruce Up. If we were called upon to decide in a representation case the appropriate unit among Fowler's employees, Board standards would not permit us to find a separate unit limited to the 19 shops previously operated by Spruce Up. Our precedent would dictate that the Board find that either all 27 shops constitute an appropriate unit, or that each individual shop constitutes an appropriate unit. It has long been recognized that the Board has wide discretion in establishing the permissible limits of bargaining units, but I think it would

[12] 202 NLRB 169.

[13] The majority's characterization of the eight additional shops of Roscoe and Fisher as an accretion to the certified unit of Fowler is tantamount to recognition that there has been a substantial change in the bargaining unit. Similarly, the characterization of Members Fanning and Penello that the "additional shops simply amount to an expansion of the bargaining unit" is tantamount to recognition by them that there has been a substantial change in the bargaining unit.

be an abuse of discretion to establish a unit comprised of Fowler's employees in the 19 shops operated formerly by Spruce Up. For the same reason we cannot establish in this unfair labor practice proceeding a unit limited to the 19 shops formerly operated by Spruce Up. Manifestly, the change in the scope of the unit and the substantial differences in the employee complement do not require Fowler to honor the Spruce Up certification.

There Is no Proof That a Majority of Fowler's Employees Were Represented by the Union

There is no basis on this record for finding that the Union represented a majority of employees of Fowler in an appropriate bargaining unit. If the substitution of Fowler to operate the 27 shops formerly operated by 3 concessionaires had involved no substantial change in the scope of the unit and if the substitution had involved no substantial change in the employee complement, it could be argued that the Board certification covering Spruce Up's employees was binding upon Fowler. As noted earlier, I believe that any such argument must be rejected on the facts disclosed by this record. This is particularly true in view of the fact that it was a decision of the Defense Department (and not Respondent) to consolidate operation of all barber shops under a single concessionaire. Similarly, it was the rejection of terms which Fowler set lawfully that resulted in the substantial change in the employee complement. We would be presented with a different legal problem if the changes in the employee complement in this case had resulted from improper or unlawful conduct by Fowler.

In my opinion, any inquiry as to whether the Union enjoyed majority support among Fowler's employees must be directed at the employment complement in all 27 shops operated by Fowler and not just the 19 shops previously operated by Spruce Up. The record establishes that on March 2, 1970, the day preceding Fowler's takeover of the 27 shops, there were 13 barbers employed in the Fisher shops, 10 barbers employed in the Roscoe shops, and 60 barbers employed in the Spruce Up shops. It makes a substantial difference whether the inquiry is directed to a majority of 83 employees or only 60. In this connection, we cannot overlook the fact that some of the barbers who formerly worked in Spruce Up shops returned to work for Fowler in shops previously operated by concessionaires Roscoe and Fisher. Furthermore, some of the former Spruce Up barbers initially returned to work in Fisher shops and thereafter transferred at a later date to one of the shops which had been previously operated by Spruce Up.[14]

Members Fanning and Penello state in their dissents that "successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit." Chairman Miller and Member Jenkins are clearly correct in stating that such a view is contrary to the decisions of the Supreme Court in both *Burns, supra,* and *Golden State Bottling Co., supra.* Such a view also represents a sharp departure from long-standing Board precedent. This Board has consistently refused to find successorship and a duty to bargain where a majority of the new employer's work force was not composed of the employees of the old employer. Professor Stephen Goldberg points out in "The Labor Law Obligations of a Successor Employer," 63 Nw. U.L. Rev. 735, that he could find only two cases over a 20-year period in which the Board imposed a duty to bargain when there was no such majority; namely, *Firchau Logging Company, Inc.,* 126 NLRB 1215 (1960),[15] and *John Stepp's Friendly Ford, Inc.,* 141 NLRB 1065, enforcement denied 338 F.2d 833, 836 (C.A. 9, 1964). The decision of the Court of Appeals for the Ninth Circuit reversing the *Stepp's* case has been cited with approval by the Board.[16] The court stated:

> The problem we face is that which arises when we have both a new owner and a substantial change in the personnel of the employee unit. While other courts have wrestled with this problem the situations before them have been confused by the fact that in most cases either the change in ownership or the change in the employee personnel has been brought about under circumstances suggesting a lack of good faith and an attempt, on the part of the employer, to avoid the effect of the certification. Here there is no such suggestion.
>
> The controlling question here, it would seem to us, is whether the new owner may rationally be said in substance, as to the unit in question, to have taken over and succeeded to his predecessor's employees. If he has not—if, on the contrary, he has within the unit in question secured his own employees—then he is not, as to the employees in question, a successor. He is their original employer. In such case both the employer

[14] This is further evidence that a unit limited to former Spruce Up shops ceased to be appropriate under Fowler's operation

[15] Apparently the *Firchau Logging Company, Inc.*, case was not the subject of judicial review

[16] *Federal Electric Corporation,* 167 NLRB 469, *Tallakson Ford, Inc.*, 171 NLRB 503

and the employee unit are strangers to the certification and to the election upon which it was based. Nothing remains of the relationship to which the certification [is] attached. Under such circumstances, in our judgment, the certification cannot stand.

In the case before us it cannot rationally be said that the company has taken over and succeeded to Westward's salesman unit. Out of the twelve Westward salesmen only three, after interviews, were employed. It is clear from the record that they were not employed because of their Westward connection but because Stepp thought that they were the best he could get to fill out his sales force. Furthermore, half of the new employee unit consisted of men who already were Stepp employees. Even assuming that a Westward employment status continued to attach to the three Westward salesmen, still the character of the new unit clearly was more Stepp than Westward. [Footnotes omitted.]

The Fifth Circuit has also quoted with approval from the Ninth Circuit's decision in the *Stepp's Friendly Ford* case. See *N.L.R.B.* v. *United Industrial Workers of the Seafarers International Union of North America, etc. [Port Richmond Elevator],* 422 F.2d 59 (C.A. 5, 1970).

We have said that in determining whether the "employing industry" remains substantially the same we inquire, *inter alia,* as to whether the new employer "has the same or substantially the same workforce."[17] See *Georgetown Stainless Mfg. Corp.*, 198 NLRB No. 41. Can it be said that the new employer "has the same or substantially the same workforce" if he hires less than a majority of the old employer's employees? I think not. Indeed, it has been pointed out that "The cases involving the presumption of full majority status for a certified union are primarily instances where the purchasing enterprise has retained all or most of the old employees." See the concurring opinion of Judge Leventhal in *International Association of Machinists, District Lodge 94, AFL–CIO, et al.* v. *N.L.R.B.*, 414 F.2d 1135 (C.A.D.C., 1969). In this connection, I think the Sixth Circuit Court of Appeals was clearly correct in *N.L.R.B.* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (C.A. 6, 1972), that the "single factor" relied on to find successor status in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964), was that 80 percent of the predecessor's employees had been hired by the new employer.

I disagree with the view of Members Fanning and Penello that all that is required for successorship is that a "legally significant portion of the successor's employment force must consist of employees previously employed in the bargaining unit."

I also disagree with the view of the majority (Chairman Miller and Member Jenkins) that the eight Roscoe and Fisher shops are an accretion to the old unit but the test of majority should be measured in the "pre-existing unit." Contrary to the suggestion of the majority, *Burns* does not support such a test because the *Burns* decision is predicated upon the stated premise that the "bargaining unit remains unchanged." Notwithstanding the fact that the unit in *Burns* remained unchanged, four of the Justices (Burger, Rehnquist, Brennan, and Powell) declined to find successorship. They reasoned that Burns' hiring a majority of Wackenhut employees did not establish that the union represented a majority of Burns' employees. They stated (406 U.S. at 297):

> First, it is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had ever expressed their views one way or the other about the union as a bargaining representative It may be that, if asked, all would have designated the union. But they were never asked. Instead, the trial examiner concluded that because Burns was a "successor" employer to Wackenhut, it was obligated by that fact alone to bargain with the union.

The dissenters in *Burns* concluded that the imposition of the bargaining obligation under the circumstances of that case (27 of Burns' 42 employees had worked for Wackenhut) "sacrificed needlessly" the "important rights of both the employee and employ-

[17] In his speech to the Labor Law Section of the Texas Bar Association on July 7, 1967, Member Fanning correctly stated that the Board has

> relied upon a set of criteria to determine whether the "employing industry" remains substantially the same The questions asked by the Board are: (1) whether there has been a substantial continuity of the same business operations, (2) whether the new employer uses the same plant, (3) *whether he has the same or substantially the same work force,* (4) whether the same jobs exist under the same working conditions, (5) whether he employs the same supervisors, (6) whether he uses the same machinery, equipment, and methods of production, and (7) whether he manufactures the same product or offers the same services [Emphasis supplied.]

er." But the imposition of a bargaining duty here in the expanded unit the moment (April 14, 1970) a majority of old employees were hired from the preexisting unit constitutes an unreasonable extension, I believe, of the majority opinion of the Supreme Court in the *Burns* case.

Our statute guarantees employees the right to choose their bargaining representative. There is nothing in the statutory language empowering this Board to impose upon all of Fowler's employees in the 27 shops a bargaining agent the moment the old employees from Spruce Up constituted a bare majority in the 19 shops previously operated by Spruce Up. There is a fundamental fallacy in our doing that for it is based on the unsupported assumption that every former Spruce Up employee who went to work for Fowler was a union supporter. We do not know how any of the old employees hired by Fowler voted in the Spruce Up election.[18] If, however, a single one of those old employees voted against the Union the basis for presuming "continued majority status" disappears because we do not know the view of any of the new employees. There is no evidence whatever that the new employees of Fowler in either the 19 shops or the 27 shops "had ever expressed their views one way or the other about the Union as a bargaining representative." As in *Burns,* "they were never asked."[19] In my view, we "sacrifice needlessly" the statutory rights of all the new employees of Fowler by imposing a bargaining duty on Fowler.

Assuming, *arguendo,* that Chairman Miller and Member Jenkins are correct in their view that majority status must, under *Burns,* be tested in the "pre-existing unit" of 19 shops, it is unrealistic to presume that every former employee of Spruce Up hired by Fowler wanted the Union as his bargaining agent while employed by either Spruce Up or Fowler. As noted above, we do not know how any of the old employees voted in the Spruce Up election. We do know that 18 of those 32 former employees of Spruce Up ignored the Union's picket line to report to work on March 3, 1970, when Fowler commenced operations. Indeed, on April 14, all 32 of the barbers who had formerly worked for Spruce Up (as well as the remaining 23 barbers who were then working in the 19 former Spruce Up shops) were crossing the Union's picket line to work for Fowler.

In my view, we cannot presume majority support for the Union in the 19 shop unit (or the 27 shop unit) when every employee of Fowler had to cross daily the Union's picket line to report to work. Under such circumstances, we cannot presume that the percentage of Fowler employees supporting the Union was the same as the percentage of employees who had voted for the Union in the election conducted among Spruce Up's employees. My colleagues err, I think, in presuming that the Union here had majority support on April 14 simply because the Board correctly has presumed in other cases where substantially all of the former employees had been hired by a new owner that the ratio of union supporters to nonunion employees remained the same. Where the proportion of Spruce Up's employees is a bare majority in the 19 shop unit, there is no reason to assume that a majority favors union representation in the 27 shop unit

There is insufficient evidence to support a finding or an inference that the majority of Fowler's employees wanted the Union to act as their bargaining representative on April 14.

The Absence of a Valid Request To Bargain

The majority finds that Respondent unlawfully refused to bargain after April 14, 1970, "although the record does not reflect that the Union expressly requested Fowler to bargain" after that date. There is no claim that Fowler made any unilateral changes on April 14 or thereafter. Apparently, the majority is holding that once Fowler had hired what they believe to be a majority of his employees from the pool of former Spruce Up employees, it was incumbent upon Fowler to seek out the Union and volunteer to bargain with it. Fowler's failure to volunteer to bargain is held to be an unlawful refusal to bargain.

The majority reasons that it was unnecessary for the Union to request bargaining after April 14 because the earlier requests made by the Union at a time when Fowler had not even hired a majority of his barbers in the former 19 Spruce Up shops was a "continuing request." The majority concludes that it would have been "futile" for the Union to have again requested bargaining and the Union was therefore relieved of this essential requirement to a finding of an 8(a)(5) violation of the Act.

I fail to understand why it would have been "futile" for the Union to have again requested bargaining if it had obtained its alleged majority in the 19 shop unit. On the occasions the Union had made requests for bargaining prior to April 14, it did not represent a majority of the employees. Fowler's

[18] We cannot be certain as to how the 18 former Spruce Up barbers voted in the earlier election Logic dictates, however, that the 18 Spruce Up barbers who reported to work for Fowler on March 3 included the bulk of the 13 barbers who voted against the Union in the Board election See *Spruce Up Corporation,* 181 NLRB 721, which reflects that 63 ballots were cast in the election among the barbers in the *19* shops then operated by Spruce Up

[19] Contrary to the suggestion of my colleagues, proof of majority status was the burden of the General Counsel Fowler had no duty to assert a defense until the General Counsel offered satisfactory proof of majority The Spruce Up certification does not satisfy that burden

refusal to recognize the Union on those occasions was required by the Act. Otherwise, Fowler would have dealt with a minority union in violation of Section 8(a)(2) of the Act. While the picketing may have demonstrated the Union's continuing interest in representing the employees, it cannot be regarded, in my opinion, as evidence that Fowler would not bargain if requested to do so. In sum, I find the factors relied on by my colleagues to show that a request for bargaining would have been futile to be wholly unconvincing.

There are positive reasons for believing that a request for bargaining would not have been futile. At the time of the last request for bargaining on April 11, Fowler told the Union that he "couldn't say anything unless [his] attorney was there." This was not only a lawful response but also indicated that Fowler intended to abide by his legal obligations. More importantly, there is no finding that Fowler committed independent violations of the Act either before or after April 14, and there is no claim that Fowler made any unilateral changes in terms or conditions of employment after April 14. There is no reason for the Board to assume that a request for bargaining would have been rejected by Fowler because of a fundamental opposition to the purposes of the Act or because his earlier refusal to recognize a minority union stemmed from a desire to gain time to dissipate the Union's support among the employees. On the contrary, his continued hiring of former Spruce Up employees clearly evinces a lack of hostility towards the rights of employees under the Act.

I therefore cannot subscribe to the finding of my colleagues that a request for bargaining by the Union on and after April 14 would have been an exercise in futility. My colleagues are here placing the burden on the Respondent to determine if and when a union represented a lawful majority of his employees and further requires him to then seek out the union and offer to bargain. In my opinion the statute imposes no such burden. Accordingly, I would not find that the Respondent violated Section 8(a)(5) of the Act on and after April 14.

Conclusion

This case was tried on the theory that Respondent Fowler violated Section 8(a)(5) of the Act when it changed the commission rates of the former Spruce Up employees without bargaining with the Union. In the original decision I joined my colleagues in finding the alleged violation on that theory. Our earlier decision rests on a major premise rejected in *Burns*. I think we are obliged to acknowledge that our earlier finding that Fowler is a successor is erroneous. The duty to bargain could arise only if the record established the majority status of the Union in an appropriate unit of Fowler's employees, a request by the Union to bargain in that unit, and a refusal by Fowler to bargain in response to such request. Since there is insufficient evidence in the record with respect to majority in an appropriate unit, no proof of a request to bargain, and no proof of a refusal, there is no basis for finding a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. Since I do not find that Respondent refused to bargain unlawfully, I disagree with the make-whole and reinstatement order provisions which are predicated upon the erroneous premise that Fowler was obliged to dismiss any barber hired after May 28 when the 20 Spruce Up barbers "made an unconditional offer to accept employment with Fowler."

The Supreme Court's decision in *Burns* requires dismissal of the complaint in its entirety.

MEMBER FANNING, dissenting in part and concurring in part:

Having reconsidered the issues in this case in the light of the Supreme Court's decision in the *Burns* case,[20] I reaffirm the findings and conclusions set forth in the Board's original decision herein, except as modified herein.

The facts in this case are fairly straightforward and not subject to substantial dispute. As noted by the majority, for many years the barber shops at Fort Bragg have been operated by concessionaires selected through periodic competitive bidding. From about March 1969 through March 1970, 19 of the shops were operated by Respondent Spruce Up. Eight other shops were operated by two other concessionaires, Roscoe and Fisher. In early 1970 Cicero Fowler, a barber on the base, submitted the low bid for the operation of all 27 shops. Respondent Cicero Fowler, t/a Fowler Barber Shops, commenced operation of the shops on March 3, 1970.

Prior to that date, the Union had been certified by the Board as the exclusive representative of Respondent Spruce Up's employees. As a result of unfair labor practices committed by Spruce Up, the Union's certification had not resulted in any collective bargaining at the time Fowler took over operation of the shops.

As is clear from the record, Fowler took over the operations with knowledge of the Union's representative status. Not only does the record reveal that he had been employed as a barber on the base since

[20] *N L R B* v. *Burns International Security Services, Inc*, 406 U S 272 (1972).

1939, but he conceded on the record that, "I knew that they had a union out there . . . ."[21] Moreover, on February 6, when it became apparent that Fowler had submitted the low bid, the Union went to Fowler and asked him whether he intended to hire the barbers who were then working in the shops. Fowler responded affirmatively, "All the barbers who are working will work."[22] However, he indicated that he intended to change the commission by which their wages were determined. The Union then requested recognition as the barbers' bargaining representative and demanded bargaining about the contemplated changes. Fowler refused on the ground that the barbers were not yet his employees and he had no legal obligation to bargain until he took over the operations. On February 26, the Union renewed its request for bargaining. Fowler again refused, reiterating that there was no "employment contract" at that moment, and therefore nothing to bargain about. The Union advised Fowler that all the barbers desired to continue working at the base, but that it could not tell how many would report to work if Fowler continued his refusal to negotiate.

On February 27, Fowler had his son Charles deliver a letter to each of the barbers working in the shops which Fowler was to take over on March 3, setting forth the commission rates he intended to pay (these were different from the rates in effect during Spruce Up's operation) and extending to the barbers "the opportunity to work for me under the above mentioned terms. If you are willing to work for me please sign at the bottom of this statement and return it to my office no later than 12:00 p.m., March 2nd, 1970." On March 2, the Union held a meeting to discuss the letter The meeting was attended by most of the barbers then working including barbers then working for Roscoe and Fisher.

At this meeting the barbers voted not to sign the individual form-letter contracts, to withhold their services, and to picket the base. The next day a majority of the barbers on the base failed to report to work for Fowler and instituted a picket line. The record clearly reveals that the barbers refused to report to work because Fowler insisted on dealing with them individually and not through the Union. On March 3, 18 former Spruce Up barbers reported to work along with 3 other barbers. Other former Spruce Up barbers reported to work at various times thereafter and, on May 28, the Union sent Fowler a letter on behalf of 22 named barbers, including 4 barbers who had worked for Roscoe and Fisher, containing an unconditional "offer to return to work for you at Fort Bragg." Fowler did not reply to the letter, and none of these were hired, except for two who had already reported for work before the letter was sent Fowler testified that his reason for not hiring them was that "they had not come to him personally and requested their jobs back," and "that there was nobody refused" who came to him personally and asked for employment.

As indicated, on March 3, Fowler's work force in the former Spruce Up shops consisted of 18 former Spruce Up employees and 3 other barbers. Thereafter, on March 10, the figures were 19 former Spruce Up employees and 17 other barbers;[23] on March 17, 22 former Spruce Up employees and 26 other barbers;[24] on March 24, 20 former Spruce Up barbers and 28 new barbers;[25] on March 31, 21 former Spruce Up employees and 26 new barbers;[26] on April 7, 23 former Spruce Up employees and 25 new barbers;[27] and on April 14, 32 former Spruce Up employees and 23 new barbers.[28] Continually thereafter, former Spruce Up employees outnumbered other barbers; on May 28, the ratio was 34 former Spruce Up employees to 18 new barbers[29] and by December 4, the comparable figures were 32 to 7.[30] At all times, the former Spruce Up employees constituted the stable nucleus of the employment force as the record shows that there was constant turnover among the non-Spruce Up barbers, with many of them remaining on the payroll for only a matter of days.

It is on the basis of these facts that we must determine (1) whether Respondent Fowler succeeded to Respondent Spruce Up's bargaining obligation on and after March 3, 1970, when it commenced operating the barber shops at Fort Bragg, and (2) whether Respondent Fowler violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning the fixing of the terms and conditions of employment which were to obtain upon the commencement of operations.

[21] Fowler's son, Charles, and brother, Edgar, had been employed in the Spruce Up bargaining unit; both reported to work for Fowler on March 3 Charles Fowler assists his father in the management of the business and was present with his father at the February 6 meeting, discussed *infra*, between Fowler and the Union

[22] The concessionaire agreement signed by Fowler required him to give first consideration to the employment of employees of the previous concessionaire Through the years, the practice and custom at Fort Bragg was for barbers to continue working despite the numerous changes in concessionaires

[23] For all shops the figures are Spruce-Up barbers, 20, new barbers, 17, Roscoe barbers, 0, Fisher barbers, 0

[24] For all shops the figures are Spruce Up barbers, 23, new barbers, 27, Roscoe barbers, 0, Fisher barbers, 0

[25] For all shops the figures are Spruce Up barbers, 21, new barbers, 28, Roscoe barbers, 1, Fisher barbers, 0

[26] For all shops the figures are Spruce Up barbers, 22, new barbers, 26, Roscoe barbers, 1, Fisher barbers, 0

[27] For all shops the figures are Spruce Up barbers, 25, new barbers, 25, Roscoe barbers, 3, Fisher barbers, 3

[28] For all shops the figures are Spruce Up barbers, 36, new barbers, 25, Roscoe barbers, 3, Fisher barbers, 4

[29] For all shops the figures are Spruce Up barbers, 36, new barbers, 18, Roscoe barbers, 8, Fisher barbers, 7

[30] For all shops the figures are Spruce Up barbers, 34, new barbers, 7, Roscoe barbers, 8, Fisher barbers, 7

Although it is apparent that an affirmative answer to the second question would afford substantial support for an affirmative answer to the first, I do not believe the converse is true; that is, I believe the successorship of Fowler has been established on this record without regard to how one determines the pretakeover bargaining issue, and I shall treat that issue first.

I am satisfied that a realistic appraisal of the foregoing evidence demonstrates that at all times material herein Respondent Fowler intended to rely, and did in fact rely, on former Spruce Up employees to staff his barber shops.[31] As such employees, at all times after March 3, constituted the stable nucleus of his employment force, constituting a majority of such force at most times including the first 2 weeks of operations and at all times after April 14, I find that Fowler was a successor to Spruce Up and succeeded to the latter's bargaining obligation under the certification on and after March 3, 1970,[32] and that he violated Section 8(a)(5) by failing and refusing to recognize and bargain with the Union pursuant to its demand of February 26 which demand, the record reflects, continued in effect thereafter.

I cannot agree with the Chairman and Member Jenkins that Fowler did not succeed to Spruce Up's bargaining obligation until April 14, the date that Fowler had hired a majority (32 of 55) of former Spruce Up employees. Successorship does not depend on the employment of a majority of the predecessor's employees, but on whether a legally significant portion of the successor's employment force consists of employees previously employed in the bargaining unit.[33] In making that determination, the question of whether employees of the predecessor actually predominate over other employees can hardly be the acid test of successorship, although it may be an important factor in determining whether the successor employer has a basis for doubting the Union's majority status. Here, of course, Fowler began operations with a work force in which former Spruce Up employees were in the majority for the first 2 weeks of operations. During the next 4 weeks of operations, there were fluctuations in the employment force resulting in a slight numerical minority of former Spruce Up employees, and then a further fluctuation after April 14 bringing them back into a majority of the work force. One can not realistically say that these fluctuations changed the character or nature of the employing industry. The fact is that the former Spruce Up employees did constitute the stable nucleus of Fowler's employment force, as the Board previously found, and Fowler did continue to look to such employees for his permanent work force to perform the same operations in the same locations as they did for Spruce Up. There is nothing in the *Burns* decision to require a different result now of this aspect of the case,[34] and, accordingly, I reaffirm the original decision in this respect.[35]

On the question of whether Respondent Fowler was obligated to bargain with the Union over the fixing of his initial terms and conditions of employment, it seems to me entirely clear that Respondent Fowler did plan to retain the former Spruce Up employees. He not only told the Union that "all barbers who are now working, will work," he offered each of those barbers employment. He hired all those who reported for work on March 3, and those who thereafter crossed the picket line. Had each of those barbers reported for work on March 3, there can be no doubt but that Fowler would have put them all to work. Surely, an employer who offers employment to all the employees of a predecessor "clearly plans to retain all of the employees in the unit . . . ." The fact that some employees may refuse the offer of employment has nothing to do with the "plans" or

[31] Thus, Fowler not only assured the Union that "all the barbers who are working will work," he offered each barber employment; and though the offer seemingly set a deadline for acceptance by noon on March 2, Fowler continued to treat it as a valid outstanding offer by employing Spruce Up employees who initially refused to report, but later gave up their protest of his refusal to negotiate with the Union and indicated, on the record, that even as late as May 28, he would have accepted personal unconditional offers to return to work

[32] *Polytech, Incorporated,* 186 NLRB 984.

[33] *N.L.R.B.* v. *Polytech, Incorporated,* 469 F.2d 1226, (C.A. 8, 1972), enfg. 186 NLRB 984. Here, of course, if a successorship was established as of March 3, the Union's majority status would not be subject to question during the remainder of the certification year

[34] I do not regard the fact that Fowler is the operator of all 27 barber shops on the base, whereas Spruce Up operated only 19, as destroying the vitality of the certification of the Union as the exclusive representative of an appropriate unit of all barbers employed by Fowler The additional shops simply amount to an expansion of the bargaining unit during the certification year. Assuming, *arguendo,* that such expansion might have afforded Fowler a basis for doubting the Union's majority status in the expanded unit, Fowler does not appear to have raised that defense herein In any event, the record discloses that even considering all the shops operated by Fowler, Fowler commenced operations with a work force in which Spruce Up barbers constituted a majority, that Spruce Up barbers at all times constituted the stable nucleus of his work force and a clear majority of the force when his operations stabilized. Moreover, the barbers employed by Roscoe and Fisher attended and participated in the union meeting of March 2, and they joined with Spruce Up barbers in refusing to report for work on March 3, though by May 15, 8 of 10 Roscoe barbers had reported for work and by April 21, 7 of 13 Fisher barbers had done so The record demonstrates that Roscoe and Fisher barbers intended to and did make common cause with the Spruce Up barbers in refusing to report to work on March 3 because of Fowler's refusal to bargain with the Union, and that Fowler was aware of that fact, having been advised by the Union that it was representing those barbers also pursuant to individual authorizations and requests to do so. It seems clear to me, therefore, that the Roscoe and Fisher shops merged with the Spruce Up shops to form an expanded bargaining unit and that the principals on either side of this labor dispute so viewed the matter and acted at all times in accordance with that view. Accordingly, for all the foregoing reasons, I find that the Union's certification as the exclusive representative of all barbers employed by Respondent Spruce Up survived the change in concessionaires and retained its vitality as to the expanded unit of barbers employed by Respondent Fowler. *N.L.R.B.* v. *J. W. Rex Co.*, 243 F.2d 356 (C.A. 3, 1957), enfg. 115 NLRB 775

[35] For reasons stated by Member Penello, the statement in fn. 6 of the decision in *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168 (1973), does not require a different result

intent of the offering employer. It may be that he will have to alter his plans, if the employees refuse the offer of employment, but at the time of the offer, he assuredly plans to retain those employees. Where such is the case, and where the union representing those employees has made an appropriate bargaining demand, I agree with Member Penello that under *Burns* the successor is obligated to consult with the union "before he fixes terms." Construing the term "fixes" in this context as the actual establishment of those terms on the day the successor commences operations, as the *Burns* decision seems to require, would eliminate the fears of the majority that successor employers would lose the right to use their own business judgment in the establishment of initial terms and conditions of employment, were they to comment favorably upon the employment prospects of the predecessors' employees. For as the Court explicitly noted with respect to *Burns* in an obvious effort to delineate the bargaining obligation arising under its "clearly plans to retain" test,

> Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that Burns refused to bargain on July 12 when it rejected the overtures of the union. It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. *If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without* committing an unfair labor practice.[36] [Emphasis supplied.]

Inasmuch as *Burns* had completed its hiring process sometime in June and as that hiring process consisted of offers of employment at terms and conditions of employment established unilaterally by *Burns*, the Court's indication that the bargaining obligation had then become apparent, and would have been enforceable by timely demand for bargaining by the union[37] so as to require good-faith bargaining over the terms and conditions of employment already offered by *Burns* and accepted by the employees, necessarily means that under the "clearly plans to retain" test, it is the successor's intention to hire, not its determination of the terms under which it will hire, that determines whether or not he must honor a timely demand for bargaining prior to the commencement of operations. Nor can there be any economic injury to the successor in bargaining in good faith prior to the commencement of operations, for, assuming good-faith bargaining on his part, if the union can not persuade him that other terms are more equitable, he is perfectly free to impose those terms as the opening terms and conditions of employment upon the commencement of operations.

The majority's contrary construction of this aspect of the *Burns* decision leads to the anomalous, if not absurd, result that a bargaining obligation over the establishment of the successor's initial terms and conditions of employment arises when the successor plans to retain the former employees at the terms their union had already established through collective bargaining with the predecessor employer but not when he plans to retain them at terms different from those previously established. The majority would bring to bear "the mediatory influence of negotiation"[38] where there is no controversy, but deny its appropriate use where there is controversy. They thus turn the Act on its head, and to no useful end. For it is apparent, from the whole sequence of events in this case, that once Respondent Fowler had determined to rely on Spruce Up employees to operate his shops, the bone of contention between him and those employees was his refusal to deal with them through their Union. When Fowler informed the Union that "all the barbers who are not working will work," almost a month remained before he was to take over the operation of the barber shops. Had he honored the Union's request to bargain over the change in commission rates he intended to make, the negotiation process would have had time to work out an acceptable agreement without danger of work stoppages during that process. Had good-faith efforts failed to result in agreement in such circumstances, Fowler would have been free to initiate the offered terms as his opening terms. The decision of employees to work or to withhold their services would then have been made in the light of Fowler's good-faith dealing with their Union and vindication of their exercise of Section 7 rights, not in the light of an adamant denial of such rights.

Accordingly, for these reasons and those stated by Member Penello, I join him in finding that Respon-

[36] *Burns, supra* at 295.

[37] The union did not demand bargaining before operations commenced but waited until July 12

[38] "One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Products Corp* v *N L.R B*, 379 U S. 203, 211 (1964).

dent Fowler violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain on and after February 6, 1970, with the Union over the fixing of the initial terms and conditions of employment, and in dealing directly with employees as to such matters on February 27, 1970.

The remedy for this violation poses some difficulties. On the one hand, *Burns* holds that the terms and conditions of employment afforded by the predecessor are not to be regarded as those of the successor, who has the right to establish his own terms. Fowler's exercise of the right to establish his own terms did not, however, carry with it the right to refuse the Union's timely demand to negotiate concerning those terms. One can not know with any certainty whether negotiations over the terms would have resulted in changes therein. I believe, however, that the record affords a basis for concluding that, had such negotiations been conducted in good faith, the Spruce Up barbers would have reported to work even at Fowler's terms and worked thereunder pending conclusion of collective bargaining, for the record clearly reveals that those employees' reason for failing to report to work under those terms was Fowler's refusal to bargain with the Union concerning them. In these circumstances, and as Fowler was obviously willing at all times to hire them at such terms, I believe the appropriate remedy for his refusal to negotiate with the Union is to require him to honor the employees' unconditional offer to report to work made through their Union on May 28, 1970, replacing if necessary those barbers not employed in the bargaining unit prior to March 3, and to make them whole by payments based on his commission rate structure for loss of wages from 5 days after May 28 until such time as he offers them employment. I would, of course, also include in the Order appropriate cease-and-desist and affirmative bargaining provisions to remedy the violations of Section 8(a)(5) I find to have occurred herein. Accordingly, I join in the Order issued by Chairman Miller and Member Jenkins to the extent it provides the relief indicated above.

MEMBER PENELLO, dissenting in part, concurring in part:

Contrary to the majority, I believe that a proper application of the principles enunciated by the Supreme Court in *Burns* requires a finding that Respondent Fowler's conduct in refusing to bargain with the Union prior to establishing his commission rates initially, and in bypassing the Union and dealing directly with the barbers as individuals, violated Section 8(a)(5) and (1) of the Act. In *Burns*, the Court held that in general a successor is free to set the initial conditions of employment upon which rehiring is conditioned without bargaining with the Union, since prior to hiring a substantial proportion of his predecessor's employees it will not be clear that he has a duty to bargain with the Union. The only instance in which the duty to bargain may precede the formal rehiring of employees is where, as *Burns* states, "it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."[39] This is such a case.

The facts in this case are not disputed. The majority agree that Fowler told the Union on February 6, 1970,[40] when asked what his intentions were about hiring barbers, "All the barbers who are working will work." However, by strained legal psychoanalysis, they contend that, despite the plain meaning of his words, Fowler did not really intend to retain the barbers.

Intent is the state of mind with which an act is done. It is rarely susceptible of direct proof, but must ordinarily be inferred from the surrounding facts. Here, we have the rare instance in which direct evidence is available, for the facts show that Fowler specifically stated that he wanted to retain the employees by his own words on February 6. He communicated this desire to the employees by individual form letters subsequently. Most importantly, his voiced intent to retain these barbers eventually became a reality when they made up the majority of his work force.

This analysis is consistent with the exact language of the Court in *Burns* and is the only approach that gives those words any significance. The Court there said nothing about a conditional intent to hire. The majority are attempting to revise substantially what the Court said, for their view would, in effect, abrogate the exception, as the only case when a violation would occur under their test would be the unlikely situation where a successor says he will continue the employees under the exact terms and conditions as existed before the takeover. If he says that he "plans" to alter the status quo in any way, while at the same time indicating a desire to retain the old employees, they would find this amounts to a conditional intent to hire. I cannot accept that the Supreme Court would announce a rule of law that is so restrictive as to amount to a nullity.

The majority opinion expresses great concern that this position will have the undesirable result of discouraging new employers "from commenting

[39] *Burns*, *supra* at 294–295

[40] All dates hereinafter are in 1970

favorably at all upon employment prospects of old employees for fear [they] would thereby forfeit [the] right to unilaterally set initial terms . . . ." However, they seriously misread the *Burns* decision by even suggesting such a consequence. The Court in *Burns* did not forbid any successor from setting initial terms on its own once it announces it intends to retain its predecessor's employees. The Court merely said that in this situation "it will be appropriate to have [the new employer] initially consult with the employees' bargaining representative *before* he fixes terms." (Emphasis supplied.) I regard this duty as merely an obligation to refrain from dealing with the unit employees individually concerning their future working conditions until it has notified the union and bargained to an impasse.[41]

Having thus negotiated with the union, the successor is then free to fix his terms whether the union agrees or not. In my view this is not too heavy a burden to put on any employer in order to protect the employees' Section 7 rights "to bargain collectively through representatives of their own choosing" with respect to matters affecting the employees' interests. Certainly, to avoid the whole impact of *Burns* any "well-advised" employer could refuse ever to take over any employees of the predecessor and thus it would never become a successor within the meaning of the Act as this Board has defined successorship. However, such refusal to employ the existing complement has not occurred to my knowledge judging by the number of cases in which the Board has found a new employer to be a "successor" and will not occur as long as many purchasers as a practical matter need the experienced employees of their predecessor to continue the business successfully.

Contrary to the majority, I believe that the present case is analogous to *Howard Johnson Company,* 198 NLRB No. 98, a case that the majority agrees with me fell within the *Burns* proviso, the only difference being that there the employer had already taken over the company and here the discussion with the Union was in advance of takeover. There, the successor at the time of his takeover announced his wages and employee benefits, which were different from those of the predecessor, at the same time that he reassured the employees of their job. Yet, the Board did not there find that the intention to retain the employees was "conditional" upon their acceptance of the new conditions, despite the fact that under the logic of the majority, had any employees objected to the successor's terms and conditions, the successor would certainly not have retained these employees on their own terms.

Moreover, my interpretation of the Court's language in *Burns* accords with the Board's decision in *Chemrock Corporation,* 151 NLRB 1074, where the Board considered the same question of whether a purchaser is obligated to bargain with the union representing its predecessor's employees before it has hired them and concluded in the affirmative.

In *Chemrock,* a newly formed company purchased a growing plant during the term of the seller's contract with the union as representative of his truckdrivers. Although the purchaser continued operations of the plant without change and with the same production employees, it informed the drivers that it would deal with them only as "free agents" on an individual basis at a wage rate below the contract rate. When the truckdrivers told the employer to discuss the matter with the union it refused to do so, hired new truckdrivers, and thereafter refused to deal further with the former drivers. The Board held that the drivers were employees of the purchaser even though they had not been hired by the purchaser, and thus the purchaser was obligated to bargain with their union. In reaching this conclusion the Board was guided by the decisions of the Supreme Court in *Phelps-Dodge*[42] and *Hearst Publications*[43] holding that the term "employee" must be given a broad meaning in keeping with the statute's broad terms and purposes. The Board in *Chemrock* stated that where:

> . . . the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as "employees" of the purchaser as that term is used in the Act. Such individuals posses a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than, for example, the mere applicant for employment . . . . The particular individuals involved here were unquestionably "employees" of the enterprise at the time of the transfer of plant ownership. The work they had been doing was to be continued without change. Clearly employees in such a situation are entitled to seek through bargaining to protect their economic

[41] Certainly it is well established that after an impasse is reached, an employer is then free to make unilateral changes in working conditions consistent with his rejected offer to the union *N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-225, *N.L.R.B.* v. *Almeida Bus Lines, Inc.*, 333 F.2d 729 (C.A. 1, 1964), *N.L.R.B.* v. *Tex-Tan, Inc.*, 318 F.2d 472 (C.A. 5, 1963), *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144 (C.A. 7), *N.L.R.B.* v. *Landis Tool Company*, 193 F.2d 279 (C.A. 3)

[42] *Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177

[43] *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111

> relationship to the enterprise that employs them.[44]

The Board also observed in that case that the following language in the Supreme Court's opinion in *Wiley*[45] was pertinent to the issue:

> Employees and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship . . . .[46]

In addition, the Board found an independent 8(a)(1) violation in the successor's bypassing the Union and dealing directly with the individual employees:[47]

> . . . As has been shown above, during the interim period between the time it contracted for the purchase of the plant and the time it took physical possession, Respondent, deliberately bypassing the Union, entered into direct dealings with the drivers concerning their continued tenure of employment and the terms and conditions of such continued employment. It is undisputed that the Union at least during that period still retained its statutory status as the employees' duly designated bargaining agent in an appropriate unit. Section 7 of the Act guarantees employees the right, *inter alia,* "to bargain collectively through representatives of their own choosing" with respect to matters affecting their employee interests. And that right, in turn, exacts a correlative obligation from one who would deal with represented employees as to such matters to deal with them through their statutory representative and not directly.

This cogent analysis applies with equal force to the case at bar. Thus, on February 6 when Respondent Fowler first manifested an intent to hire all of the employees in the unit, he became obligated to bargain with the Union prior to establishing his commission rates. His refusal to do so constituted a violation of Section 8(a)(5).[48] Similarly, it is quite clear that when Respondent Fowler sent a letter to each of the barbers on February 27 setting out the new commission rates which he intended to pay and requesting any barber who desired to work for him under those conditions to indicate his intention of doing so by signing and returning the letter, he was acting in an employer capacity and dealing with them individually about matters as to the negotiation of which the employees had a legitimate right and interest to be represented by their bargaining agent, and concerning which the Union had sought bargaining on two occasions. Respondent Fowler's insistence upon bypassing the Union and dealing with the employees directly, in my view, was a clear infringement of the employees' Section 7 rights, and as such was violative of Section 8(a)(1).

Accordingly, I find that the former Spruce Up employees who concertedly refused to work for Respondent Fowler on or about March 3 did so because of Fowler's unlawful conduct in refusing to recognize and bargain with the Union, bypassing the Union, and dealing directly with the barbers as individuals regarding the barbers' terms and conditions of employment. I thus find them to be unfair labor practice strikers who were entitled to reinstatement to their former positions or, if those positions were no longer available, to equivalent positions, at the time Respondent Fowler received their unconditional offer to return to work on May 28, replacing, if necessary, those employees who were hired in the unit after March 3. For the reasons set forth in our original decision herein, I would order Respondent Fowler to pay backpay to the unfair labor practice strikers based on either the rate-price structure prevailing under Spruce Up, or the new rate-price structure established by Respondent Fowler, whichever results in the higher backpay to the individual employees.

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[44] *Chemrock, supra* at 1078

[45] *John Wiley & Sons* v *Livingston,* 376 U.S 543 (1964).

[46] *Wiley, supra* at 549, quoted in *Chemrock, supra* at 1078–79

[47] *Chemrock, supra* at 1080–81

[48] In light of my view that the bargaining obligation of Fowler commenced on February 6, 1970, I do not find it necessary to reach the unit issue In any event, however, I share the view of Member Fanning that the addition of eight shops to the unit did not substantially change the essential nature of the unit as it constituted only "an expansion of the bargaining unit." I also subscribe to Member Fanning's view that only "a legally significant portion of the successor's employment force" must consist of employees previously employed in the bargaining unit, and that Fowler was a successor to Spruce Up as of March 3, 1970, because "Fowler commenced operations with a work force in which Spruce Up barbers constituted a majority [and] Spruce Up barbers at all times constituted the stable nucleus of his work force and a clear majority of the force when his operations stabilized." I do not think that Chairman Miller and Members Jenkins and Kennedy can derive much support from *Golden State, supra,* which deals with the circumstances in which a successor will be required to bargain to remedy the refusal to bargain of his predecessor The Court therein was not speaking to a case where the employing industry survived the change in ownership so as to impose a bargaining obligation upon the successor.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection

To refrain from any or all of these things.

I WILL NOT do anything that interferes with these rights.

I WILL bargain, upon request, with Journeyman Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL–CIO, Local 844, as the exclusive representative of the employees in the unit described below with respect to wages, hours, and all other terms and conditions of employment, and, if an agreement is reached, embody it in a signed contract. The unit is:

> All employees performing barbering services, including shop managers and co-managers, in the barber shops formerly operated by Spruce Up Corporation at Fort Bragg, North Carolina, excluding office clerical employees, shoeshine employees, guards, and supervisors as defined in the Act.

I WILL offer the persons named below their old jobs, or if such jobs no longer exist, substantially equivalent jobs, dismissing, if necessary, any employees hired after May 28, 1970, to replace these employees. If, after taking these measures, there are still not enough positions available to reinstate all those listed below desiring reinstatement, I will place any remaining employees on a preferential hiring list and offer them jobs when positions become available.

Allen, Christopher, Jr.	Hooper, Thomas, Jr.
Bailey, Jimmie A.	Hudson, James
Ballew, David G.	Hunt, Hector
Bilbrey, Earl L.	Lee, Joseph M.
Brown, David C.	McCormick, George E.
Butler, Thaddeus L.	Pridgen, Willie C.
Cole, E. C.	Sinclair, Howard
Green, William Edward	Smith, James C.
Hall, Joe P.	Williams, Merriel B.
Hargrove, Eugene D.	Womble, Jesse E.

I WILL make whole the above-named employees for any earnings lost by them as a result of my failure to reinstate them on and after May 28, 1970.

All my employees are free to belong, or not to belong, to Journeymen Barbers, Hair Dressers, Cosmetologists and Proprietors' International Union of America, AFL–CIO, Local 844.

CICERO FOWLER T/A
FOWLER'S BARBER SHOPS
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1624 Wachovia Building, 301 North Main Street, Winston-Salem, North Carolina 27101, Telephone 919–723–9211.